

A Simon Savarimuthu a/l Thevarajah v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NO B-05(M)-528-11 OF 2017
UMI KALTHUM, HARMINDAR SINGH AND STEPHEN
CHUNG JJCA
29 JULY 2019

- C** *Evidence — Inference — Conduct of accused — Accused on being approached by police party after he received box from courier deliveryman looked shocked, dropped box and attempted to run away — All members of police party wore plain clothes — Trial judge inferred from accused's conduct that he had knowledge that box contained dangerous drugs — Whether it was equally probable accused was*
- D** *frightened when accosted by group of strangers — Whether benefit of doubt had to be given to accused — Whether prosecution's failure to call key witness who tipped-off police that he suspected box contained dangerous drugs gave rise to doubts and gaps in prosecution's case — Whether prosecution failed to satisfactorily explain why key witness was not produced at trial or why statement that was recorded from him was also not produced — Whether trial judge erred in not invoking adverse inference against prosecution for not calling key witness — Whether trial judge erred in finding accused had physical possession or custody of box containing the drugs*
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- F** The instant appeal was against the appellant's conviction and sentence of death by the High Court which found him guilty of having trafficked in 1,498g of methamphetamine on the road in front of an apartment block ('Mentari Court'). According to the prosecution's evidence, police had received a call from the manager ('Ong') of a courier service company saying that he had
- G** received a box sent from China and stating that it contained bicycle parts which Ong felt contained dangerous drugs. Ong said his suspicion was based on a similar incident a week earlier when another box said to contain bicycle parts from China as found to contain dangerous drugs. The box in the instant case was supposed to be delivered to the appellant at Mentari Court. A police party,
- H** in plain clothes, went undercover to deliver the box to the appellant. While one of the policemen posed as the courier company's delivery-man, the others lay in ambush and when the appellant came to collect the box, he was arrested after a short chase and scuffle. This was because when the ambush party identified themselves as police officers as soon as the appellant had received the box, the
- I** appellant looked shocked, dropped the box and ran away. The appellant was brought to the police station together with the box where it was opened and found to contain the methamphetamine concealed within bicycle seats. The trial court ruled that the appellant had custody and control of the box once he had collected the same and acknowledged its receipt by signing on the relevant

forms and that his conduct of looking shocked, dropping the box and attempting to flee when approached by the police officers showed that he knew the box contained the drugs. The trial court also found that the appellant's act of carrying the box with the drugs amounted to trafficking as defined under s 2 of the Dangerous Drugs Act 1952. In his defence to the charge, the appellant said he did not live in Mentari Court but a friend named Steven who did live there and dealt online in bicycle parts had ordered the parts from China under the appellant's name. The trial judge rejected the defence's story as a 'recent invention' and a bare denial because Steven's existence was never raised during the prosecution's case, nor was Steven called to testify; there was also no reason why Steven could not have placed the order for the parts himself nor any reason for the police witnesses to frame the appellant with false evidence. At the hearing of the instant appeal, the appellant argued that: (a) he did not have custody, care, control or possession of the drugs in the box because he never had a chance to open and inspect its contents as he was arrested immediately after he received the box from the 'courier man'; (b) the box came sealed from China and was only opened by police at the police station; (c) the prosecution's case was fatally flawed for not calling Ong to testify and explain why he told police he suspected the box contained dangerous drugs (the trial judge did not invoke adverse inference against the prosecution for not calling Ong); (d) even a statement that was recorded from Ong before he allegedly became untraceable was not produced at the trial; (e) no witness from the Customs Department was called to testify although cargo from overseas sent via courier would usually be scanned or inspected by Customs; and (f) the trial judge did not give sufficient weight to the defence nor appreciate that there were serious gaps and doubts in the prosecution's evidence which could not support a conviction. The respondent submitted that the findings of the trial judge were correct and should not be disturbed.

Held, unanimously allowing the appeal, setting aside the appellant's conviction and sentence and acquitting and discharging him:

- (1) Ong, whose courier company received the box from China and who alerted SP8 about possible drugs in the box, was a material witness and vital link in the prosecution's case and should have been called to testify. The police should have required him to enter into a bond or served him with a subpoena to appear as witness but they only started trying to locate him in the midst of the prosecution's case. No explanation was given why the police did not locate Ong earlier. Even the statement that police had recorded from Ong during investigations was not produced as evidence under s 32 of the Evidence Act 1950 ('the EA') during the trial. Again, no explanation was given for this failure. The trial judge did not deal with these issues in his grounds of judgment although they were raised before him. By not calling Ong to testify, there were gaps and doubts in the prosecution's case and an adverse inference should have been invoked

- A against the prosecution under s 114(g) of the EA. The trial judge had failed to appreciate the evidence adduced and had misdirected himself (see paras 31–33).
- B (2) SP7 testified that he opened the box in the police station and found several bicycle seats inside. On inspection, he found that the tapes on the plastic wrappings of the saddle seats had been opened or broken, packets of drugs had been concealed under the seats and the plastic wrappings had been re-taped. No evidence was adduced as to who did it; and whether it was done in China, in Hong Kong, during transit or during
- C the journey since the box was sent via Cathay Pacific Airlines, or after the box had arrived in Malaysia (see para 32).
- D (3) The trial judge's finding that the appellant had knowledge of the drugs in the box was merely an inference drawn from the facts. In the instant case, the policemen carrying out the operation to deliver the box and to arrest the appellant were not in police uniform. SP7's perception that the appellant looked shocked was very subjective. To the appellant, the men who approached him were not in uniform and were complete strangers. It was natural for him to react, to struggle and to flee not knowing their intentions even though SP7 said that he had identified themselves as
- E police officers. These actions happened very fast, in the blink of an eye. Several inferences could be made from the facts, one of which was that the appellant's conduct reflected a guilty mind. But it could also be inferred that he was trying to flee from a group of strangers who had accosted him. Therefore, the appellant's conduct of looking shocked and
- F trying to flee did not necessarily lead to the irresistible inference that he had knowledge of the drugs (see paras 34–36).
- G (4) On the facts and circumstances of the case, the appellant could not be said to have been in physical possession of the box. He only had custody of the box momentarily — from the time he received it from SP6 and until he was arrested by SP7. This was not a case where the appellant was found with drugs tucked away in his jeans or was seen carrying a bag that contained drugs walking along a street and tried to run away when
- H approached by police. This was not a case where the appellant was in close proximity to or had access to the box. He never had access to the box until it was handed to him by SP6. The trial judge erred in finding that the appellant had physical possession or custody of the box (see paras 37–38).
- I (5) There was no evidence that the appellant suspected or knew of the drugs in the box except that it contained bicycle parts sent from China. The prosecution did not lead any direct evidence to show that the appellant had ordered the bicycle parts from China and was the owner of the box and its contents. The courier company called the appellant to take delivery of the box because his name and phone number were on it. No evidence was led as to who put the appellant's name and address there. It

was not disputed that the box was taped and sent from China to the Malaysian courier company for delivery and that it was opened by SP7 in the police station. At the time the box was delivered to the appellant and he was arrested, the appellant did not have a chance or opportunity to open and examine the contents of the box. There was no evidence to show that the appellant had a suspicion but had deliberately shut his eyes (see paras 29 & 39).

- (6) Where several inferences could be drawn from the proved facts and one of them favoured the appellant, any benefit of doubt had to be given to the appellant. On the facts and circumstances of the case, the trial judge erred in drawing the inference that the appellant had knowledge of the drugs and that he was in possession of it. It was unsafe to convict the appellant under the charge (see para 40).

[Bahasa Malaysia summary]

Rayuan ini adalah terhadap sabitan perayu dan hukuman mati oleh Mahkamah Tinggi yang mendapatinya bersalah untuk mengedar 1,498g methamphetamine di jalan dihadapan satu blok apartment ('Mentari Court'). Menurut keterangan pihak pendakwaan, polis telah menerima panggilan telefon daripada pengurus ('Ong') satu syarikat perkhidmatan kurier dengan menyatakan bahawa dia telah menerima satu kotak yang dihantar dari China yang dikatakan mengandungi bahagian basikal yang mana Ong merasakan mengandungi dadah berbahaya tersebut. Ong mengatakan bahawa syak wasangkanya adalah berdasarkan satu keadaan yang hampir serupa seminggu terdahulu apabila satu lagi kotak yang dikatakan mengandungi bahagian basikal dari Cina didapati mengandungi dadah berbahaya. Kotak dalam kes ini sepatutnya dihantar kepada perayu di Mentari Court. Satu pasukan polis, dalam pakaian preman, telah memasang kaki untuk menghantar kotak tersebut kepada perayu. Apabila seorang anggota polis menyamar sebagai penghantar syarikat kurier, yang lain telah menyorok untuk menyerbu dan apabila perayu datang untuk mengambil kotak tersebut dia telah ditangkap selepas satu adegan kejar mengejar dan pergelutan singkat. Ini adalah kerana pasukan sebulan mengenalkan diri mereka sebagai pegawai polis sebaik sahaja perayu telah menerima kotak tersebut, perayu kelihatan terkejut dan menjatuhkan kotak tersebut dan melarikan diri. Perayu telah dibawa kepada balai polis berserta dengan kotak tersebut yang mana ianya dibuka dan didapati mengandungi methamphetamine yang disembunyikan di dalam kerusi basikal tersebut. Mahkamah bicara memutuskan bahawa perayu mempunyai kawalan dan penjagaan kotak tersebut apabila dia telah mengambilnya dan mengakui penerimaan dengan menunrunkan tandatangannya atas borang yang berkaitan dan kelakuannya kelihatan terkejut, menjatuhkan kotak tersebut dan cuba untuk melarikan diri apabila didatangi oleh pegawai polis menunjukan bahawa dia mengetahui kotak tersebut mengandungi dadah. Mahkamah bicara juga memutuskan bahawa tindakan perayu mengangkat kotak tersebut dengan

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- A dadah terjumlah kepada pengedaran dibawah s 2 Akta Dadah Berbahaya 1952. Dalam membela diri terhadap pertuduhan, perayu mengatakan bahawa dia tidak tinggal di Mentari Court namun rakannya bernama Steven yang tinggal di sana dan berurusan secara atas talian bahagian basikal dan telah membuat
- B pesanan bahagian tersebut dari China dibawah nama perayu. Hakim bicara menolak cerita pembelaan sebagai satu perkara yang baru direka dan penafian kosong kerana kewujudannya tidak pernah dibangkitkan sewaktu kes pendakwaan, dan Steven juga tidak dipanggil untuk memberi keterangan tiada juga sebab mengapa Steven tidak boleh membuat pesanan untuk dirinya sendiri ataupun apa-apa sebab mengapa saksi polis untuk menganiaya perayu
- C dengan keterangan palsu. Sewaktu pendengaran rayuan ini, perayu menghujahkan bahawa: (a) dia tidak mempunyai kawalan, jagaan, milikan dadah dalam kotak kerana dia tidak mempunyai peluang untuk membuka dan memeriksa kandungannya kerana dia telah ditahan sejurus selepas dia menerima kotak tersebut daripada lelaki kurier; (b) kotak tersebut telah datang bersil daripada China dan hanya dibuka oleh pihak polis di balai polis; (c) kes pendakwaan mempunyai kecacatan fatal kerana tidak memanggil Ong untuk memberi keterangan dan menjelaskan mengapa dia memberitahu polis bahawa dia mengesakki kotak tersebut mengandungi dadah berbahaya (hakim bicara tidak menggunakan inferens bertentangan terhadap pendakwaan kerana tidak memanggil Ong); (d) malah satu pernyataan yang dirakam daripada Ong sebelum dia kononnya tidak dapat dikesan tidak dikemukakan semasa perbincangan; (e) tiada saksi dari Jabatan Kastam dipanggil untuk memberi keterangan walaupun kargo dari luar negara di hantar melalui kurier akan kebiasaannya di imbas atau diperiksa oleh Kastam; dan (f) hakim bicara tidak memberikan pemberatan yang mencukup kepada pembelaan atau mengaamati bahawa wujud kelompangan serious dan keraguan dalam keterangan pendakwaan yang tidak boleh menyokong satu sabitan. Responden menghujahkan bahawa dapatan hakim bicara adalah betul dan tidak patut diganggu
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Diputuskan, secara sebulat suara membenarkan rayuan, mengetepikan sabitan perayu dan hukuman dan melepaskan dan membebaskannya:

- H (1) Ong, yang mana syarikat kuriernya menerima kotak daripada China yang memaklumkan kepada SP8 mengenai dadah yang mungkin ditemui didalam kotak, adalah seorang saksi material dan penting dalam kes pendakwaan dan sepatutnya dipanggil untuk memberikan keterangan. Polis sepatutnya memerlukannya untuk memasuki satu bon atau menyerahkan kepadanya sapina untuk hadir sebagai saksi akan tetapi mereka hanya mula untuk mengesannya semasa kes pendakwaan. Tiada penjelasan diberikan mengapa pihak polis tidak mengesan Ong lebih awal. Walaupun pernyataan kepada polis telah dirakam daripada Ong sewaktu siasatan tidak dikemukakan sebagai keterangan dibawah s 32 Akta Keterangan 1950 ('AK') sewaktu perbincangan. Dan sekali lagi,
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- tiada penjelasan diberikan berkenaan dengan kegagalan ini. Hakim bicara tidak berurus dengan isu ini dalam alasan penghakimannya walaupun ianya dibangkitkan dihadapannya. Dengan tidak memanggil Ong untuk memberi keterangan, wujud kelompangan dan keraguan dalam kes pendakwaan dan satu inferens bertentangan sepatutnya dikemukakan terhadap pendakwaan dibawah s 114(g) AK. Hakim bicara gagal untuk mengamati keterangan yang dikemukakan dan telah tersalah arah (lihat perenggan 31–33). A B
- (2) SP7 memberi keterangan bahawa dia telah membuka kotak tersebut di balai polis dan menemui beberapa kerusi basikal di dalamnya yang telah dibuka atau dirosakkan, paket-paket dadah yang telah disorok dibawah kerusi tersebut dan bungkusan plastik yang telah dilekat semula. Tiada keterangan dikemukakan mengenai siapa yang melakukannya, atau sama ada ianya dilakukan di China, di Hong Kong, sewaktu transit atau dalam perjalanan memandangkan kotak tersebut dihantar melalui Cathay Pacific Airlines, atau selepas kotak tersebut sampai di Malaysia (lihat perenggan 32). C D
- (3) Dapatan hakim bicara bahawa perayu mempunyai pengetahuan dadah didalam kotak adalah satu inferens yang dibuat berdasarkan fakta. Dalam kes ini, anggota polis yang menjalankan operasi untuk menghantar kotak dan menahan perayu tidak memakai pakaian seragam polis. Presepsi SP7 bahawa perayu kelihatan terkejut adalah amat subjektif. Kepada perayu, lelaki yang mendatangnya tidak memakai pakaian seragam dan merupakan orang asing. Adalah semulajadi untuk beliau bertindak, bergelut dan melarikan diri tanpa mengetahui niat mereka walaupun mereka mengenalkan diri mereka sebagai pegawai polis. Perkara ini berlaku sangat pantas, dalam sekelip mata. Beberapa inferens boleh dibuat daripada fakta. Salah satu daripada mereka adalah fakta yang mana tindakan perayu merupakan seorang yang mempunyai minda yang bersalah. Ianya juga boleh di buat inferens bahawa dia cuba untuk melarikan diri daripada sekumpulan orang yang tidak dikenalpasti yang menyerangnya. Oleh itu, pelakuan perayu kelihatan terkejut dan cuba untuk melarikan diri tidak semestinya membawa kepada inferens yang tidak boleh disangkal bahawa dia mempunyai pengetahuan mengenai dadah tersebut (lihat perenggan 34–36). E F G H
- (4) Atas fakta dan keadaan kes, perayu tidak boleh dikatakan berada dalam milikan kotak tersebut. Dia hanya mempunyai milikan kotak tersebut untuk seketika — daripada masa dia menerimanya dari SP6 dan sehingga dia ditahan oleh SP7. Ini bukan satu kes yang mana perayu ditemui dengan dadah yang diletakkan di dalam seluar jeansnya atau dilihat membawa beg yang mengandungi dadah berjalan dibawah satu jalan dan cuba untuk melarikan diri apabila didatangi oleh polis. Ini bukan satu kes yang mana perayu berada berhampiran dengan atau mempunyai akses I

- A kepada kotak tersebut. Dia tidak pernah mempunyai akses kepada kotak tersebut apabila ianya diserahkan kepadanya oleh SP6. Hakim bicara terkhilaf dalam mendapati perayu mempunyai milikan fizikal atau kawalan kotak tersebut (lihat perenggan 37–38).
- B (5) Tiada keterangan bahawa perayu mengesyaki atau mengetahui dadah didalam kotak kecuali ia mengandungi alat basikal yang dihantar dari China. Pendakwaan tidak mengemukakan apa-apa keterangan langsung untuk menunjukkan bahawa perayu telah membuat pesanan barangan basikal dari China dan merupakan pemilik kotak dan isi kandungannya.
- C Syarikat kurier memanggil perayu untuk menerima penghantaran kotak kerana nama dan nombor telefonnya berada pada kotak tersebut. Tiada keterangan dikemukakan yang mengatakan siapa yang meletakkan nama dan alamat perayu disitu. Ianya tidak dinafikan bahawa kotak tersebut telah dilekat dan di hantar dari China kepada syarikat kurier Malaysia
- D untuk penghantaran dan ianya telah dibuka oleh SP7 di balai polis. Pada waktu kotak tersebut dihantar kepada perayu dan dia ditahan, perayu tidak diberi peluang untuk membuka dan memeriksa isi kandungan kotak tersebut. Tiada keterangan untuk menunjukkan bahawa perayu mempunyai syak dan telah dengan sengaja menutup matanya (lihat perenggan 29 & 39).
- E (6) Apabila beberapa inferens boleh dibuat daripada fakta dan salah satu daripada mereka memihak pada perayu, apa-apa kelebihan keraguan perlu diberikan kepada perayu. Atas fakta dan keadaan kes, hakim bicara terkhilaf dalam membuat inferens bahawa perayu mempunyai pengetahuan mengenai dadah tersebut dan mempunyai milikan dadah tersebut. Ianya tidak selamat untuk mensabitkan perayu atas pertuduhan (lihat perenggan 40).]
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- G **Cases referred to**
Agbu Goodluck Ugochukwu lwn Pendakwa Raya [2018] 3 MLJ 645, CA (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Fakhrurrazi Hasan v PP [2018] Supp MLJ 1, FC (refd)
Ibrahim Mohamad & Anor v PP and another appeal [2018] Supp MLJ 280, FC (refd)
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Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Lam Peng Hoa & Anor [1996] 5 MLJ 405, HC (refd)
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PP v Lee Jun Ho & Ors [2011] 6 MLJ 220, CA (refd)
PP v Tan Tatt Eek and other appeals [2005] 2 MLJ 685, FC (refd)
Raman a/l Kunjiraman v PP [2018] Supp MLJ 86, FC (refd)
Sim Tiew Bee v PP [1973] 2 MLJ 200, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), (2)
Evidence Act 1950 ss 8, 9, 32, 114(g)

Appeal from: Criminal Trial No 45A-35-04 of 2015

Gabriel Susayan (Shalvin all Kanvinchevan with her) (Gerard Lazarus & Assoc)
for the appellant.

Ku Hayati bt Ku Haron (Deputy Public Prosecutor, Attorney General's Chambers)
for the respondent.

Stephen Chung JCA (delivering judgment of the court):

THE APPEAL

[1] The appellant was charged for trafficking of drugs as follows:

Bahawa kamu pada 3 November 2014, jam lebih kurang 2.00 petang, bertempat di tepi jalan di hadapan Mentari Court Apartment, Jalan PJS 8/9, Taman Seri Mentari, Petaling Jaya, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1498.0 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] After a trial in the High Court, the appellant was convicted and sentenced to death under sub-ss 39B(1)(a) and 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). The appellant appealed against the conviction and sentence.

[3] At the end of the appeal, we allowed the appeal, set aside the order of the High Court and acquitted and discharged the appellant under the charge. We now give our grounds as follows.

BRIEF FACTS

[4] On 3 November 2014 at about 10am, SP8 (a police officer) received a phone call from a Mr Ong Poh Yee ('Mr Ong'), a manager of a courier service company SF Global Express, regarding one box, which he suspected to contain dangerous drugs, and to be delivered to an address at Mentari Court Apartment, Petaling Jaya. On receiving the information, SP8 instructed SP7 to carry out an operation as undercover police to deliver the box and to arrest the person. SP7 instructed SP6 to act as a delivery man to accompany the courier driver ('SP5') from SF Global Express to deliver the box.

A [5] On same day, at about 2pm, as part of the operation, SP7 and his team waited in front of Mentari Court and saw the courier delivery van stopped in front of the apartment and an Indian male came and collected a box from the van which was handed over by SP6. SP7 and his team approached the Indian male and identified themselves as police officers. The Indian male person let go of the box and tried to run away but was apprehended by the police. This person was identified as the appellant in this appeal.

C [6] The box had Chinese language writing and two pieces of airway bill No 902042715158. One airway bill with the appellant's signature was retrieved from the floor. The appellant and the box ('P11') were brought to IPD Petaling Jaya. Inside the box SP7 found four transparent plastic packets containing crystalline substance concealed in the bicycle seats. The police then searched the appellant's house at Subang Jaya but did not find any incriminating item in the house.

D [7] The crystalline substance was sent to the chemistry department for analysis. SP1 carried out the analysis and confirmed that it contained methamphetamine weighing 1,498g.

E IN THE HIGH COURT

F [8] The learned judge referred to the following evidence in ruling that the appellant had custody and control of the box: (a) SP5 telephoned the appellant to collect the box and the appellant was the one who collected the box; (b) SP6 had delivered the box to the appellant who confirmed that the name stated on the box was his name and acknowledged receipt of the box by signing on the delivery bill; and (c) SP7 said the appellant looked shocked and let go of the box when the police identified themselves as police and the appellant tried to run but was apprehended.

H [9] The learned judge referred to the appellant's conduct in releasing the box after SP7 identified themselves as police and tried to escape and there was a scuffle before he was arrested. He said the appellant also looked shocked when SP7 introduced themselves. The learned judge referred to s 8 of the Evidence Act 1950 ('the EA') and that based on the appellant's conduct, it pointed to the fact that the appellant knew that the box contained dangerous drugs. The learned judge then ruled that the prosecution had proven the element of knowledge and that the appellant was in possession of the drugs.

I [10] On trafficking, the learned judge was satisfied that based on the evidence that the appellant was carrying and concealing the drugs inside the box, it amounted to trafficking as defined under s 2 of the DDA. He said based on the weight of the drugs, namely 1,498g of methamphetamine, and they

were not for self-consumption, there was the irresistible inference that it was for the purpose of trafficking. The learned judge found that the prosecution had made out a *prima facie* case against the appellant and called on him to enter defence.

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[11] The appellant testified that he had an on-line business in dealing with bicycle parts. On the day he was arrested, he received a call to collect the box which he ordered to be collected from Mentari Court. He inquired from the caller why the box was not sent to his home address and was informed that the address was given to them so the appellant had to collect the box from there. After he was arrested and the drugs were found, he told the police he did not know about the drugs and was only helping a friend by the name Steven who lived in Mentari Court who also deals in bicycle parts. He said it was Steven who ordered the bicycle seats under his (the appellant's) name.

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[12] After hearing the defence, the learned judge ruled that it was of recent invention and a bare denial. He said the evidence given by SP5, SP6 and SP7 was relevant and reliable and there was no reason for them to frame the appellant. The learned judge pointed out that the appellant did not put to the prosecution's witnesses why the box was not sent to his address and never raised the existence of Steven, which was an afterthought because Steven was never called. He said it was inherently improbable for the appellant, who had just known Steven, to have helped Steven to place the order when Steven himself was able to do so. The learned judge therefore convicted and sentenced the appellant accordingly.

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THE APPELLANT'S CASE

[13] The appellant submitted that he did not have custody, care, control and or possession of the drugs found in the box because the box which was sent from China to the courier company and handed to him in front of Mentari Court was only opened in the police station and that he did not know of the drugs inside the box which was confirmed by SP9. It was submitted that he was merely an innocent carrier.

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[14] It was submitted that he agreed to sign the airway bill and accepted the box based on the shipping details on the box that it only contained bicycle parts. It was submitted that he was not given the opportunity to open and inspect the contents before he signed and he was immediately arrested after he took delivery of the box. It was submitted that he did not know of the drugs in the box.

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[15] The appellant submitted that an adverse inference under s 114(g) of EA should be drawn against the prosecution for failing to call Mr Ong as a witness

- A as he was the one who gave the information to SP8 that the box contained drugs. It was submitted that Mr Ong was a key and material witness who should be called to explain how, why and when he knew of the contents of the box which was in his custody and whether there was any tampering by Mr Ong himself. It was submitted that the police had recorded a statement from Mr
- B Ong but failed to produce it in court which led to the inference that the police tried to hide something.

- C [16] It was submitted that all overseas boxes sent via courier would have been scanned or inspected by the Customs Department but the prosecution failed to call anyone from Customs. It was submitted that there existed a gap in the prosecution's case and the failure to do so had prejudiced the defence. It was submitted that there were doubts raised and that the prosecution had failed to prove its case beyond reasonable doubt against the appellant.

- D [17] The appellant submitted that the learned judge failed to give sufficient weight to the defence that the box was sent to Steven at Mentari Court and that at the earliest opportunity the appellant had raised this but the police failed to investigate who stayed there. It was submitted that Steven was the real trafficker and that the learned judge failed to appreciate this piece of evidence.
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CASE FOR THE RESPONDENT

- F [18] It was submitted that based on the facts adduced by the prosecution, it was clear that the appellant had custody and control of the box which contained the drugs taking into account that the box was addressed to the appellant and he signed and took delivery of the box as the recipient.

- G [19] The appellant submitted that knowledge of the drugs could be inferred from the conduct demonstrated by the appellant in letting go of the box when the police introduced themselves and that the appellant tried to run away. It was submitted that the appellant's conduct pointed to his guilty mind without the need to rely on any statutory presumption. It was submitted that the learned judge had made a correct finding of fact that the appellant had
- H knowledge of the drugs inside the box.

- I [20] It was submitted that the act of the appellant carrying the box which contained the drugs when he was arrested fell squarely under s 2 of DDA that the appellant was trafficking the drugs. It was submitted that the learned judge was not wrong to invoke both the act of carrying and concealing at the same time while making the finding of trafficking.

[21] The respondent submitted that the learned judge had given due consideration to the defence raised including the man named 'Steven' and that

the appellant was an innocent carrier. It was submitted that the existence of Steven was never raised during the prosecution's case. It was submitted that it was correct for the learned judge to reject the defence of innocent carrier and that the appellant failed to raise any reasonable doubt on the prosecution's case.

OUR DECISION

[22] Before us, we were referred to the testimonies of the witnesses and the exhibits. Based on these and the submissions made, our concern was whether it was safe to convict the appellant. Our concern revolved around the issues of whether the appellant was in possession of the drugs, namely, was he in physical possession of the drugs and whether he knew that there were drugs inside the box delivered to him by an undercover policeman ('SP6') in front of Mentari Court.

[23] On the evidence before him, the learned judge found that the appellant had knowledge of the drugs found inside the box and was in possession of the drugs. The learned judge did not invoke the presumption under s 37(d) nor under s 37(da) of the DDA. He relied on s 8 of the EA in drawing the inference that the appellant had knowledge of the drugs based on his conduct of looking shocked and letting go of the box and tried to run away after SP7 had identified himself as a police officer. The learned judge, relying on s 2 of the DDA, found that the prosecution had made out a prima facie case of trafficking against the appellant and called him to enter his defence to the charge.

[24] It has been held that the reaction of an accused in looking stunned or shocked upon being approached by the police was admissible under s 8 of the EA since it has a direct bearing on the fact in issue as the drugs were found in the box. It was then incumbent on the accused to explain as required by s 9 of the same Act — see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19. The question is, was the learned judge correct in drawing the inference that he did on the facts and circumstances of this case. Before we deal with this question, we will deal with other issues which will put this question in context.

[25] In a criminal trial for trafficking of drugs, the burden is on the prosecution to prove possession of the drugs before the issue of trafficking in the drugs can arise. To prove possession, the prosecution must establish that the accused person has custody or control of the drugs and he has the required knowledge of the thing possessed — see *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237.

[26] It was the contention of the prosecution, which the learned judge accepted, that based on the waybill ('P17A'), custom duty invoice ('P18') and invoice ('P19'), the appellant had ordered the bicycle parts from China. His

- A name was stated in the three documents. He confirmed his name, signed the waybill and was alone when he acknowledged receipt of the box from SP6. When SP7 identified himself as police, the appellant looked shocked, let go of the box and tried to run away but was arrested. The learned judge found that the appellant had custody of the box. The appellant was brought to the police station with the box. SP7 opened the box and found four packets containing crystalline substance concealed in the bicycle seats. From these facts, the learned judge inferred that the appellant knew and had knowledge of the drugs found inside the box and found that the appellant had possession of the drugs. The learned judge found that the appellant in carrying the box containing the drugs amounted to trafficking of the drugs as defined in s 2 of the DDA.

- [27] Based on the appeal record, the appellant received a telephone call from the courier company to take delivery of a box at Mentari Court which he did at the appointed time. The box, sent from China, stated that it contained bicycle parts. The appellant's name was set out in the waybill as the contact person with an address at Mentari Court. After SP6 had asked and confirmed the appellant's name, he asked the appellant to sign and acknowledge receipt of the box and handed the box to the appellant. SP7 and his team of policemen approached and identified themselves as policemen and arrested the appellant when he tried to run away.

- [28] The prosecution did not adduce evidence that the appellant had ordered the bicycle parts from China. This piece of evidence and the name of Steven only came about after the appellant was called to enter defence and after he had testified. To digress for a moment, the learned trial judge ruled that the defence was a mere denial and an afterthought because these facts/issues were not raised nor put during the prosecution's case. With regard to the defence's case, it has been held that an appellant does not have a duty to disclose his defence and no adverse inference may be drawn against the appellant for remaining silent upon his arrest. Similarly, no adverse inference may be drawn against the appellant for not putting his defence during the prosecution's case, except that it goes to the weight of the defence and whether it raises any reasonable doubt on the prosecution's case — see *Raman a/l Kunjiraman v Public Prosecutor* [2018] Supp MLJ 86.

- [29] Coming back to the issues, based on P17A, P18 and P19, the appellant was not stated as the person who ordered the bicycle parts or receiver of the box or of the bicycle parts whereas his name was put as the contact person with the address at Mentari Court. No evidence was led as to who put the appellant's name and address there — see *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200. SP3 and SP4 had testified that the appellant did not stay at nor rent the address at Mentari Court. SP8 had testified that Mr Ong from the courier company contacted him about a suspicious box because the names of the

shipper and receiver were incomplete. For the shipper, a name Eric was stated as the contact person with a phone number. Mr Ong told SP8 that he tried to contact Eric but was not successful. For the receiver, no name or company was stated. SP8 asked Mr Ong whether he scanned the box to find out the contents and Mr Ong told him his company did not have any scanning machine. Mr Ong told SP8 that a week earlier, another box said to contain bicycle parts from China were found to contain dangerous drugs which were seized by the police. These were the basis for his suspicion which was why he contacted SP8. Mr Ong was not called to testify and what Mr Ong had said to SP8 was hearsay. However, what Mr Ong had said to SP8, which led to the police operation and arrest of the appellant, had an important bearing on the prosecution's narratives of this case.

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[30] Counsel for the appellant submitted that the prosecution should have called Mr Ong as he was a crucial witness and in failing to do so, there were gaps in the prosecution's case. It was also submitted that the learned judge had therefore erred in failing to invoke the adverse inference under s 114(g) of the EA against the prosecution. The prosecution submitted that they had made every effort to trace Mr Ong but in vain because he was working in Singapore. SP9 had prepared a report ('P38') setting out his efforts to trace Mr Ong.

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[31] The appeal record showed that on 3 November 2014, SP6 delivered the box to the appellant in front of Mentari Court where the latter was arrested by SP7. The trial commenced on 17 April 2017. Based on P38, on 26 May 2017, in the midst of the trial, SP9 was only instructed to trace Mr Ong to come to court to testify. The role of Mr Ong was an issue during the trial which was apparent to the prosecution and the court. It was not in dispute that a statement was recorded from Mr Ong during police investigation into this case. Mr Ong was a material witness and the police should have required him to enter into a bond or served a subpoena on him to appear as a witness but only decided to trace him in the midst of the prosecution's case. No explanation was given why the police could not do so earlier.

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[32] SP7 had testified that he opened the box in the police station and found several bicycle seats. On inspection, he found that the tapes on the plastic wrappings of these saddle seats had been opened or broken, the packets of drugs were concealed under the seats and the plastic wrappings re-taped. No evidence was adduced as to who did it; and whether it was done in China, in Hong Kong, in transit or during the journey since the box was sent via Cathay Pacific Airlines, or after the box arrived in Malaysia. Therefore Mr Ong, the manager of the courier company which received the box sent from China and who alerted SP8 about the drugs in the box, was a material witness and a vital link in the prosecution's case and should have been called as such to explain.

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- A [33] Further, after failing to contact Mr Ong in the midst of the trial, the prosecution should have, but chose not to, produce the statement of Mr Ong as evidence under s 32 of the EA notwithstanding that the prosecution had rendered P38. Again no explanation was given — see *Public Prosecutor v Lam Peng Hoa & Anor* [1996] 5 MLJ 405; *Public Prosecutor v Lee Jun Ho & Ors* [2011] 6 MLJ 220. The learned judge did not deal with these issues in his grounds of judgment although they were raised before him. We were of the view that in not calling Mr Ong to testify, there were gaps and doubts in the prosecution's case against the appellant and an adverse inference should have been invoked against the prosecution under s 114(g) of the EA — see
- C *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Agbu Goodluck Ugochukwu lwn Pendakwa Raya* [2018] 3 MLJ 645. We were therefore of the view that the learned judge had failed to appreciate the evidence adduced and had misdirected himself on the evidence as such.
- D [34] On the finding by the learned judge that the appellant had knowledge of the drugs in the box, it was an inference drawn based on the facts. We emphasized the distinction between proved facts and inferences drawn from proved facts. On the facts before us, we were in as good a position as the trial judge to draw the inference whether the appellant had knowledge of the drugs. It is trite that proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It is sufficient for the prosecution to prove facts from which it can be properly inferred that an accused person had the necessary knowledge. The court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects a particular person whose knowledge is in issue — see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; *Parlan bin Dadeh v Public Prosecutor*.
- G [35] In this case the policemen, including SP6 and SP7, carrying out the operation to deliver the box and to arrest the appellant were not in police uniform. SP7 said that the appellant looked shocked but SP7's perception of the appellant's facial expression looking shocked could be very subjective. To
- H the appellant, these men who approached him were not in uniform and complete strangers to him. It was natural for the appellant to react, to struggle and tried to run not knowing their intentions although SP7 said that he identified themselves as police and tried to arrest him. It should be noted that these actions happened very fast, in the blink of an eye.
- I [36] Several inferences could be made from the facts, one of which was that he looked shocked and in trying to run away reflected a guilty mind. It could also be inferred that he was trying to flee from a group of strangers who approached him. We were of the view that the appellant looked shocked and

tried to flee did not necessarily lead to the irresistible inference that he had knowledge of the drugs. We find support in our finding from the observation of the Federal Court in *Public Prosecutor v Tan Tatt Eek and other appeals* [2005] 2 MLJ 685 as follows:

To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could easily be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evidence.

[37] At the material time, the appellant was not seen with the box or carrying the box until it was delivered to him by SP6. He only had custody of the box momentarily until he was arrested by SP7, after SP6 handed the box to him. This was not a case where the accused was seen carrying a bag containing drugs walking along a street and tried to run away when approached by the police as in the case of *Fakhrurrazi Hasan v Public Prosecutor* [2018] Supp MLJ 1 or the drugs found inside a room or a house as in the case of *Agbu Goodluck Ugochukwu lwn Pendakwa Raya* or bolted while the police was searching for drugs in the vehicle but was arrested after a chase as in the case of *Ibrahim Mohamad & Anor v Public Prosecutor and another appeal* [2018] Supp MLJ 280 or that the accused looked shocked or stunned when the drugs found were tucked away in the front of the jeans worn by the accused as in the case of *Parlan bin Dadeh v Public Prosecutor*. In those cases, the courts drew the inference that the accused had the necessary knowledge of the drugs. The facts in those cases could be distinguished from the facts of this case.

[38] This was not a case where the appellant was in close proximity to or had access to the box. He never had access to the box. He was handed the box by SP6. This raised the question whether he was in physical possession of the box which contained the drugs. On the facts and circumstances of this case, the appellant could not be said to be in physical possession of the box. On this point, we were of the view that the learned judge had erred in finding that the appellant had physical possession or custody of the box and we took comfort in the judgment of Lord Morris in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 where he said:

If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession.

[39] This then raised the question whether the appellant knew of the contents of the box since the prosecution did not lead any direct evidence that the appellant had ordered the bicycle parts and was the owner of the box and its contents. The courier company called the appellant to take delivery of the box because his name and phone number were on the box. The suspicion by the courier company then was that the box contained the drugs but mere or strong

- A suspicion was not sufficient to convict the appellant. It was not in dispute that the box was taped and sent from China to the courier company in Malaysia for delivery which was opened by SP7 in the police station after SP6 delivered the box to the appellant. At the time the box was delivered to the appellant and he was arrested, he was not given a chance or opportunity for him to open and
- B examine the contents of the box. There was no evidence led to show that the appellant had a suspicion but deliberately shut his eyes, see the judgment of Lord Reid in *Warner v Metropolitan Police Commissioner*. Based on what we have said above in our judgment, there was no evidence that the appellant suspected or knew of the drugs in the box except that it contained bicycle parts
- C sent from China.

- [40] Where several inferences can be drawn from the proved facts and one inference which can be drawn in favour of the appellant, any benefit of doubt from that inference must be given to the appellant. On the facts and
- D circumstances of the case, we were unanimous that the learned judge had erred in drawing the inference that the appellant had knowledge of the drugs in the box and that the appellant was in possession of the drugs. On the facts and our views on the case, it was not necessary for us to deal with the issue whether the appellant was an innocent carrier. For the reasons given, we found that it was
- E not safe to convict the appellant under the charge. Therefore, we allowed the appellant's appeal; we set aside the order of conviction and sentence of the High Court and acquitted and discharged the appellant as per the charge.

- F *Appeal allowed.*

Reported by Ashok Kumar

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